Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

FINAL AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 03-063104

Employee: Jose Antunez

Employer: Propipe Corporation

Insurer: Travelers Casualty & Surety Co.

Additional Party: Treasurer of Missouri as Custodian of Second Injury Fund (Denied)

Date of Accident: February 8, 2003

Place and County of Accident: St. Louis, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 11, 2006. The award and decision of Administrative Law Judge Suzette Carlisle, issued December 11, 2006, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 19th day of September 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED
John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

After a review of the entire record as a whole, and consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be modified to award employee permanent total disability benefits.

The administrative law judge correctly found that the employee met his burden of proof that he sustained a work injury to his back on February 8, 2003. I agree with the administrative law judge that the opinions of Drs. Mirkin and Cantrell are not credible with regard to the issue of causation and I find their opinions in total to be without merit. However, the administrative law judge found that employee was not permanently and totally disabled and awarded only 35% permanent partial disability of the body as a whole referable to the low back. The administrative law judge erred in not finding that employee was permanently and totally disabled.

Permanent and total disability is defined by section 287.020.7 RSMo (2000) as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident.

> The phrase "inability to return to any employment" has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment. The test for permanent total disability is whether, given the employee's situation and condition he or she is competent to compete in the open labor market. Total disability means the "inability to return to any reasonable or normal employment." An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. The pivotal question is whether any employer would reasonably be expected to employ the employee in that person's present condition, reasonably expecting the employee to perform the work for which he or she is hired.

Gordon v. Tri-State Motor Transit Company, 908 S.W.2d 849, 853 (Mo.App. S.D. 1995) (citations omitted).

The administrative law judge found that employee did not meet his burden of proof showing that he was permanently and totally disabled due to the fact that he was not credible regarding his level of complaints and inability to work after the February 8, 2003 work injury. I disagree as employee demonstrated that he is permanently and totally disabled as a result of his work injury and credibly testified as to the progression of his condition.

Employee testified that immediately following his work injury, he was forced to modify the way he performed his work duties and required assistance from his co-workers to compensate for his inability to perform his duties. Employee testified that prior to his work injury that he performed his duties without difficulty. Employee was able to work for a short time following his injury. The fact that employee made an effort to resume work after his injury reinforces employee's work ethic and does not cut against his credibility. Neither does the fact that employee reported 90% improvement in his condition after his back surgery. The record shows that employee openly reported both improvement and deterioration in his back condition. Employee reported improvement in his condition following his surgery; however, his condition began to decline after he exacerbated his condition while lifting weights during a physical therapy session. Employee consistently reported an increase in his pain levels after the lifting incident during physical therapy. Employee's increased complaints were supported by a lumbar myelogram which showed evidence of mild, gross instability at L4-5 and poor filling of the L4 and L5 nerve root sheaths as well as mild grade I spondylolisthesis at L4-5. A CT post myelogram suggested mild, grade I degenerative spondylolisthesis with evidence of gross instability with flexion-extension; some evidence of a right foraminal or lateral disk herniation at L4-5; and a bulging disk at L3-4. This prompted Dr. Youkilis to consider fusion surgery; however, Dr. Youkilis ultimately agreed with Dr. Bernardi that fusion surgery would not benefit employee. He released employee from his care and restricted employee to lifting fifty pounds without repetitive bending or lifting. Employee continued to receive treatment for his condition through the VA. His treatment included a back brace, TENS unit, physical therapy as well as pain management.

Employee testified that he suffers from daily back pain which travels down his leg to his heels. He testified to control his pain that he has to lay down. Although it did not completely alleviate the pain, employee testified that this was the most comfortable position for him. Employee testified that he can sit and stand comfortably for thirty minutes without pain. Employee testified that he uses hot and cold packs when his condition flares. He testified that his sleep is disrupted by the pain. Employee testified that he is not able to perform any household chores. Employee testified that he does not believe he is able to work and does not believe any employer would hire him in his current condition.

Employee's testimony is corroborated by a surveillance video performed on behalf of employer and introduced by employee. The video accurately portrays employee's condition in the spring of 2004, depicting him laying down on short automobile rides in the back seat of the car. It also shows employee putting pillows behind his back for support as well as laying back in the passenger seat. Employee is filmed walking cautiously and appears to be very guarded in his movement. Employee is not shown lifting or performing any tasks that would indicate that he was capable of even sedentary work.

Furthermore, employee's vocational expert, Mr. Lalk, stated that he was unaware of any employer that would be willing to hire employee based upon his skill level, experience and restrictions along with his need for extended breaks and need to lie down several times during the day.

Employee has shown that all medical expenses were necessary and reasonable to treat his condition. Employer was aware of employee's work injury as well as ongoing difficulties related to his injury. Employer failed to direct or tender necessary medical treatment for employee. As a result employee sought medical treatment from the physician of his choice. Under these circumstances, employee was acting within his right as employer neglected to provide necessary medical treatment. Accordingly, I find that employer is responsible for these past medical expenses.

Employee has demonstrated a need for future medical care associated with his February 8, 2003 work injury. Dr. Lichtenfeld recommended conservative treatment including muscle relaxers, oral steroids, anti-inflammatory and narcotic medication as well as pain management. He also opined that employee may possibly need to undergo fusion surgery in the future. Employee continued to seek treatment including pain management and physical therapy through the VA. Competent and substantial evidence supports a finding that employee is entitled to receive future medical care and treatment reasonable and necessary to cure and relieve him from the effects of his back injury.

Based upon my review of all the evidence, I find employee has met his burden by showing that he is unable to compete in the open labor market and that no employer would reasonably be expected to hire employee in his present physical condition. I also find that employee is entitled to past medical expenses and has proven the need for future medical treatment. I conclude that employee is permanently and totally disabled as a result of his back condition. Accordingly, I would modify the decision of the administrative law judge and award permanent total disability benefits.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

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John J. Hickey, Member

AWARD

Employee: Jose Antunez

Injury No.: 03-063104

Dependents: N/A

Before the

Division of Workers'

Compensation

Department of Labor and Industrial

Employer: Propipe Corporation

Additional Party:

Second Injury Fund Relations of Missouri

Insurer: Travelers Casualty & Surety Co.

Hearing Date: August 11, 2006, (Closed September 8, 2006)
Checked by: SC:tr

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes

2. Was the injury or occupational disease compensable under Chapter 287? Yes

3. Was there an accident or incident of occupational disease under the Law? Yes

4. Date of accident or onset of occupational disease: February 8, 2003

5. State location where accident occurred or occupational disease was contracted: St. Louis, Mo.

6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes

7. Did employer receive proper notice? Yes

8. Did accident or occupational disease arise out of and in the course of the employment? Yes

9. Was claim for compensation filed within time required by Law? Yes

10. Was employer insured by above insurer? Yes

11. Describe work employee was doing and how accident occurred or occupational disease contracted:
The Employee slipped and fell on a rooftop while working, and injured his back.

12. Did accident or occupational disease cause death? No

13. Part(s) of body injured by accident or occupational disease: Low back

14. Nature and extent of any permanent disability: 35% of the body as a whole referable to the low back

15. Compensation paid to-date for temporary disability: $48,247.68

16. Value necessary medical aid paid to date by employer/insurer? $53,271.25

Employee: Jose Antunez Injury No.: 03-063104

17. Value of necessary medical aid not furnished by employer/insurer? $532.00

18. Employee's average weekly wages: $1,160.00

19. Weekly compensation rate: $649.32/$340.12

20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:	$532.00
140 weeks of permanent partial disability	$47,616.80
(Less advance)	($7,500.00)
19 weeks of temporary total disability	$12,337.08

22. Second Injury Fund liability: No

TOTAL: $52,985.88

23. Future requirements awarded: None

Said payments to begin and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Dean Christianson

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jose Antunez

Injury No.: 03-063104

Dependents: N/A

Before the Division of Workers' Compensation Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri

Employer: Propipe Corporation

Additional Party: Second Injury Fund

Insurer: Travelers Casualty & Surety Co.

Checked by: SC:tr

PRELIMINARY MATTERS

A hearing was held for a final award on August 11, 2006, in the Missouri Division of Workers' Compensation, St. Louis Office, at the request of Jose Antunez ("Claimant") pursuant to §287.450. Attorney Dean Christianson represented Claimant. Attorney Lynn Newmark represented Propipe Corporation ("Employer") and Travelers Casualty & Surety Co. ("Insurer"). Assistant Attorney General Kareitha Osborne represented the Second Injury Fund (SIF). The record closed on September 8, 2006 after receipt of Ex. N-1. Venue was proper and jurisdiction properly lies with the Missouri Division of Workers' Compensation.

STIPULATIONS

1. Claimant, while in the employment of the Employer, sustained an injury by accident in the City of St. Louis;
2. Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation law;
3. Employer's liability was fully insured by Insurer;
4. Employer had notice of the injury;
5. A Claim for Compensation was filed within the time prescribed by law;
6. Claimant's average weekly wage was $1,160.00;

7. Claimant's Temporary total disability (TTD) rate is $649.32 and permanent partial disability (PPD) rate is $340.12;

8. Claimant received $48,247.68 in TTD benefits;

9. Claimant received $53,271.25 in medical benefits; and

10. Claimant received an advance of $7,500.00 against PPD or any future payments awarded.

ISSUES

1. Medical causation;
2. Liability for past medical expenses totaling $7,104.75;
3. Future medical care;
4. Past TTD totaling $12,337.08 from September 10, 2003 to January 21, 2004;
5. Nature and extent of Employer/SIF liability for PPD or PTD;

SUMMARY OF EVIDENCE

Only evidence supporting this award is summarized below. Any objections not expressly ruled on are overruled. Claimant offered Exhibits A-T. The SIF objected to the admission of Exhibits N and S and the Employer objected the admission of Exhibit N. Exhibits A-R and T were admitted. The record remained open for additional records pertaining to Exhibit N. Exhibit S was admitted after a review of all the evidence as Dr. Cantrell incorporated it into his medical records. Employer offered Exhibits 1 through 5, which were admitted over Claimant's objection to Exhibits 1 through 3.

FINDINGS OF FACT

After a careful review of record as a whole, and based upon competent and substantial evidence presented at hearing, I find the following facts:

Background Information

1. **Claimant,** born in Mexico 57 years ago, is married with two adult children and has a tenth grade education. From 1968 to 1970, Claimant served in the U.S. military, where he worked as a power train mechanic, repairing ships and removing motors. However, Claimant has no civilian experience using these skills. Claimant successfully completed welding and blueprint classes in Texas where he lived before moving to Missouri. In the past he worked changing car oil. In 2006 Claimant completed a twelve hour training course on starting a business through the Kauffman Foundation at Mineral Area College. He does not type or operate a computer.

2. Claimant worked as a pipe fitter and welder for 30 years. He worked for Employer about two years prior to the February 8, 2003 work injury. Job duties included running or replacing pipe on air conditioners, running gas lines, working with ½ inch copper pipes or 8-inch iron pipes, and lifting up to 100 pounds.

February 8, 2003 Work Accident

3. On February 8, 2003, while walking on a snow covered roof downtown and carrying a bucket of tools in each hand, Claimant slipped and fell on his back. Claimant felt a sharp pain, but was more embarrassed than hurt. Later that day, his right leg began to hurt, but he did not seek medical treatment assuming the pain would subside. However, his back and right leg pain increased, causing him to perform lighter duties although he continued to work eight hours a day. He did not seek treatment until June 2003 when he was examined by his personal physician, Dr. Vibulakaopun.

4. Claimant worked from February 8, 2003 to July 5, 2003 with the help of his supervisor and co-workers before requesting treatment from Employer. He did not miss work nor did he lift heavy objects. In order to perform his duties prior to requesting treatment, Claimant compensated by assuming unusual positions when bending, stooping, lifting, climbing and descending ladders.

Medical Treatment for the February 8, 2003 Accident

5. Pairat Vibulakaopun, M.D., Claimant's personal physician, examined him June 19, 2003 with a history of slipping on ice and landing on his back last winter without seeking immediate treatment. Right hip and leg complaints were reported and burning leg pain when walking. The doctor ordered an MRI and medication which were paid for by group insurance. An MRI on June 26, 2003 showed L4-5 mild bulge, hypertrophic degenerative facet disease and ligamentum flavum hypertrophy causing bilateral lateral recess, and L1-2 and L3-4 mild hypertrophic facet joint changes (Ex. F). Medication was prescribed and Claimant returned to work.

6. Claimant testified the pain started in his legs, and he requested treatment from Employer when the pain moved to his back. Lisa Thompson, Unity Corporate Health (UCH) nurse practitioner, examined Claimant on July 8, 2003 at

Employer's request. Claimant reported right shoulder pain, right leg numbness and limping, favoring the right leg. (Ex. L). Range of motion was limited in all planes with right shoulder weakness. X-rays showed 'five functional vertebrae' with L3-4, L5-S1 degenerative joint disease and right shoulder degenerative hypertrophy. MRI showed L4-5 medium sized right disc extrusion, L3-4 bulge and L5-S1 degeneration. Ms. Thompson opined the L4-5 disc extrusion was likely related to the February 2003 fall, however, the degeneration was not work related. Claimant was taken off work pending referral to a neurosurgeon (Ex. L).

7. R. Peter Mirkin, M.D., an orthopedic surgeon, examined Claimant at Employer's request on July 21, 2003. Claimant reported a prior back injury in 1975 which was conservatively treated. Dr. Mirkin diagnosed degenerated disc disease (DDD) and a right herniated disc at L4-5, and ordered physical therapy and epidural injections without relief. He questioned Claimant's history of accident based on his ability to work so long without treatment and suggested the disc injury may be more recent (Ex. 2-2).

8. A myelogram, showed degenerative changes L3-4 to L5-S1, worse at L4-5; L4-5 and L5-S1 degenerative facet changes worse on the left, with bulges; and L3-4 and L4-5 spondylosis and DDD (Ex. 2-2), but no herniations. Dr. Mirkin concluded Claimant displayed symptom magnification because his symptoms 'far outweighed objective findings.' He offered Claimant a lumbar decompression and fusion with a guarded prognosis, but recommended a second opinion, and returned Claimant to work.

9. On July 22, 2003, Claimant returned to Dr. Vibulakaopun due to radiating pain to the great toe while walking at work. Dr. Vibulakaopun admitted Claimant to Parkland Health Center for emergency care from July 22, 2003 to July 24, 2003. Claimant provided a history of a February 2003 fall. Examination revealed positive straight leg raise (SLR) and pain with movement of his right leg. A CT scan of the lumbar spine revealed a large right lateral L5-S1 disc herniation with central canal stenosis and L4-5 bulge with canal stenosis**.** (Ex. F). Claimant admitted at hearing that he was under Dr. Mirkin's care and the Employer had not referred him to either Parkland Health Center or Dr. Vibulakaopun.

10. Dr. Shitut provided an Independent Medical Examination (IME) at Employer's request on September 3, 2003. Dr. Shitut diagnosed L4-5 DDD. He opined that the work injury slightly aggravated Claimant's back condition but the majority of the symptoms were from the pre-existing degenerative condition. Dr. Shitut determined Claimant had reached maximum medical improvement (MMI) for the work injury and any additional treatment was needed for the pre-existing condition. Dr. Shitut opined Claimant could not return to work as a pipe fitter due to the disabling degenerative low back condition, and not because of the work injury (Ex. 2-2).

11. Dr. Shitut testified in deposition that Claimant sustained a soft tissue strain due to the February 2003 work injury, which had resolved (Ex 3-21). He opined the fall may not have aggravated the degenerative condition but could have aggravated Claimant's symptoms. He conceded that there was no way to know if or when Claimant would have developed low back symptoms if he had not fallen on February 8, 2003 (Ex 3-35).

12. Dr. Hertel, a board certified orthopedic surgeon, examined Claimant on October 9, 2003 at his attorney's request, with the same history as reported to earlier treating physicians. Examination revealed flattened lumbar lordosis, difficulty walking on the ball or heel of the right foot, flattened dorsal kyphus with scoliosis, restricted range of motion, diminished left ankle reflex, decreased sensation over an area of the bilateral thighs, and positive bilateral SLR.

13. Dr. Hertel opined X-rays showed six functioning lumbar vertebrae, instead of five, with marked narrowing L6-S1 with a spur at L4. He opined Claimant had pressure on the nerve root at L4-5 (L5-6) on the left. The extra vertebra was congenital and increased the likelihood of back pain (Ex A-17). He further opined the disc rupture caused stenosis to become symptomatic. Dr. Hertel recommended a decompression laminectomy at L4-5 (L5-6) on the left and agreed that Claimant may not be able to return to his usual work following surgery.

14. Dr. Hertel opined the February 2003 work injury was a substantial factor in causing the disc to rupture at L4-5 (L5-L6) and the need for treatment (Ex A-12, 13). He explained the gradual increase in pain is not unusual which explained Claimant's ability to work for months following injury. He opined that an injury may cause the annulus to tear and disc material to protrude and overtime extrude material, placing pressure on the nerve root (Ex A-14, Ex 2).

15. Dr. Cantrell examined Claimant at the Employer's request on January 21, 2004 for evaluation and treatment. Claimant's new complaints were: alternating radiating pain in the right and left legs, palmer numbness on both feet, and low back pain. Claimant tested positively bilaterally for SLR and Dr. Cantrell opined these new symptoms may not be related to the February 2003 work injury. He found no neurologic deficits connected with Claimant's subjective complaints. He further opined that traumatic symptoms may increase within hours or days, but not over months. Dr. Cantrell diagnosed a lumbar strain/sprain, recommended physical therapy, returned Claimant to work full duty, and concluded alterations in duties would be needed as a result of the degenerative condition not the work injury.

16. Claimant reported to Dr. Cantrell that he sat in the car with his knees on the floor facing the seat to relieve pain. However, Dr. Cantrell noted Claimant did not sit that way on video surveillance tapes dated 1/30, 2/3 or 2/4 (Ex S). Dr. Cantrell found that the fact that he could work four months after the injury is evidence he can continue to do so. He opined that Claimant's degenerative condition was not due to the February 2003 work injury. No anatomic abnormality

was found. He concluded Claimant had reached MMI from the work injury, discontinued therapy, and released him to full duty March 4, 2004 (Ex 1).

17. John E. Krettek, M.D., examined Claimant at Employer's request on May 20, 2004 for an IME. Claimant complained of low back and bilateral leg pain with numbness. He noted Claimant responded dramatically to light touch during examination. Dr. Krettek diagnosed spinal stenosis L4-5 and recommended surgery however; he did not find either to be work related (Ex M).

18. Andrew S. Youkilis, M.D examined Claimant on July 6, 2004, after Dr. Krettek retired. Examination revealed positive SLR on the right, with weakness, and decreased sensation in the L5 distribution. Dr. Youkilis recommended a lumbar laminectomy L5-S1 and microdiscectomy L5-6.

19. Dr. Youkilis performed a L4-6 laminectomy for stenosis and a right L5-6 microdiscectomy for herniation on August 4, 2004. After surgery, Claimant reported 90% improvement, later experiencing a setback in physical therapy. Dr. Youkilis stopped therapy October 16, 2004 after Claimant complained of extreme pain during sessions. A dispute occurred when the physical therapist denied Claimant's assertion that he injured himself lifting weights during a session. Dr. Youkilis ordered an MRI which did not show recurrent herniation or lumbar stenosis at L5-6, but possibly at L5-6 and recommended a second opinion as he could not determine the source of Claimant's complaints.

20. Robert J. Bernardi, M.D., a board certified neurosurgeon, examined Claimant at Employer's request on December 14, 2004 for an IME. Complaints included back, buttock and leg pain. Dr. Bernardi opined that the mechanism of injury described by Claimant is consistent with low back injury which could produce disc herniation. Dr. Bernardi further opined that the medical care to date was appropriate and necessary. However, multiple Waddell signs were found on examination. The October MRI showed decompression L5-6 and post myelogram CT revealed 'mild bilateral lateral recess narrowing L5-6,' which Dr. Bernardi did not find significant, and he opined the spine was not unstable. He further opined that the sixth vertebra placed added stress on the next segment above resulting in degenerative facet joints, which produced mild spondylolisthesis which was not related to a work injury. (Ex 5-Ex B).

21. In the presence of Waddell signs and no neurologic deficit, Dr. Bernardi did not recommend a fusion as it would be based solely on Claimant's subjective complaints. He found Claimant had attained MMI and returned him to work with a seventy pound lifting restriction. Dr. Youkilis released him to return to work with a fifty pound lifting restriction due to his 'difficult to define pain syndrome' (Ex M). Claimant testified that Employer provided no additional medical treatment.

22. In January 2005 Claimant began treating with the Veteran's Administration Hospital (VA) which provided a TENS unit and physical therapy. No surgery was recommended and Claimant testified he was told that no more could be done.

23. Mark Lichtenfeld, M.D., a board certified medical examiner, examined Claimant at his attorney's request on May 5, 2005 and diagnosed the following conditions due to the February 8, 2003 work injury: lumbar strain, acceleration of pre-existing degenerative changes, L4-5 disc extrusion, L3-4 bulge, instability L4-5 Grade I spondylolisthesis, and poor filling S1 and left L5.

24. Dr. Lichtenfeld opined the February 2003 work injury was the substantial factor which caused these conditions, and rated Claimant 35% disabled of the body as a whole. He recommended on-going medication, MRI, fusion surgery to correct the spondylolisthesis at L4-5 (Ex C-Ex 2-15), and pain management. Dr. Lichtenfeld opined the spondylolisthesis and scarring resulted from surgery and spondylolisthesis was not present on the July 2003 CT. Therefore, it could not be degenerative.

25. Dr. Lichtenfeld rated the following pre-existing conditions: a) 15% PPD of the body as a whole for gastroesophageal reflux disease and gastritis, b) 40% PPD at the left elbow for a fracture, and c) 15% PPD of the body as a whole for emphysema. He opined the pre-existing conditions combine with the primary low back condition to create an overall disability that is greater than their simple sum and create a significant obstacle and hindrance to Claimant obtaining employment or reemployment (Ex C-Ex 2-16).

26. Due to the February 2003 work injury, Dr. Lichtenfeld recommended Claimant avoid bending, twisting, stooping, lifting more than 25 pounds once and 15 pounds repetitively, prolonged sitting or standing, and squatting. Restrictions for pre-existing injuries include: avoiding hot environments with poor ventilation, working at a rapid pace, repetitive work, power gripping and use of power tools with the left upper extremity, exposure to toxic and noxious chemicals and asbestos, work in printing factories and chemical plants, and more snack breaks for his stomach (Ex C-Ex2-16).

27. A functional capacity evaluation (FCE) was performed in March 2004 and revealed sub maximal effort and symptom magnification making it impossible to determine Claimant's abilities and limitations. Similar findings were made during work hardening in October 2004 and a second FCE in November 2004.

28. Claimant was involved in a motor vehicle accident while riding as a passenger on August 25,

2005 and received treatment at Missouri Baptist Medical Center. Complaints included pain to the right groin and low back radiating to right thigh. Lumbar spine X-rays show mild degenerative changes in the facet joints. Claimant was diagnosed with a back sprain and released to follow up with Dr. Youkilis, but no follow up appointment was made (Ex N-1).

29. Timothy Lalk, a vocational rehabilitation expert, evaluated Claimant at the request of his attorney on April 17, 2006. Claimant provided a consistent history of a work accident, except he said it occurred February 8, 2002. Claimant also reported a motor vehicle accident 3 to 4 months before the evaluation, which increased symptoms in his low back, groin, testicle and both legs for three months, then returned to the pre-auto accident level. Claimant reported low back and leg pain, inability to lift a cup of coffee in the a.m., increased pain with standing greater than an hour, wearing shoes, or driving longer than thirty minutes, and difficulty sleeping.

30. Wide-Range Achievement Test results show fourth grade reading skills and sixth grade math skills. Claimant refused to complete the reading comprehension section due to pain. Consequently, Mr. Lalk could not determine whether Claimant was able to pursue post-secondary training. But based on Claimant's history and two test results, Mr. Lalk concluded Claimant was not likely to pursue post-secondary training unless he first successfully completed remedial training (Ex D-15).

31. In 2006 Claimant began training with the Kauffman Foundation to learn how to form a small mechanical business working with pipes. He made the decision because he was bored and he could lie down as needed. However, Mr. Lalk concluded Claimant could not operate a business full time with his symptoms. He also concluded Claimant's symptoms prevented him from performing within the restrictions set by Drs. Bernardi, Youkilis or Lichtenfeld. Mr. Lalk opined no employer would allow him to lie down as often as Claimant requested.

32. Claimant has not applied for work within the restrictions or sought vocational assistance since being released by Dr. Youkilis.

33. Claimant continued to treat with the VA and Dr. Vibulakaopun. Claimant identified emergency room bills from July 25, 2003 and for morphine provided the same day. He also identified bills from August 7, 2004 for an emergency room visit several days after his surgery for a urinary problem and for medical bills in 2004 for radiologists Barber and Mosier.

34. Claimant testified his current complaints include back pain with prolonged standing, radiating down the back of his left leg to the heel and across the top of his foot to his big toe. Pain and tingling extend to his groin. Claimant testified 'the nerves feel like someone is pulling them.' Sitting causes leg pain which is increased without a cushion. He avoids kneeling in church. Sleeping on his back wakes him due to discomfort. He experiences a bone on bone feeling as if something is being inserted into his back. During the day he walks ten minutes, watches television, talks to neighbors, and reads the newspaper.

35. Claimant can sit or stand up to 30 minutes and walk a half mile. However, too much walking causes pain, requiring him to lie down. He was not able to travel on a family trip due to the distance. However, he admitted on cross-examination that he drove 1½ hours to Sauget, Illinois to gamble on July 20, 2006, when he was scheduled for a deposition for this case. Claimant testified he left before the deposition due to a mix-up. At the casino, he placed two bets then left after two hours due to discomfort.

Pre-existing Injuries

36. Claimant injured his back in 1975 when he stepped on a pipe. He received conservative treatment, and later a settlement. Claimant denied receiving any treatment for his back between 1975 and February 2003.

37. Claimant testified that he received stitches to his right upper arm while serving in the Army which enabled him to receive a disability check from the Army. Claimant reported decreased grip strength requiring him to use his left arm for support when working.

38. Claimant testified he fractured his left elbow as a child and now has arthritis. It hurts occasionally but he had no problem performing his work with either arm before February 2003. Before February 2003, Claimant could lift up to 50 pounds with either arm, and up to 100 pounds with both arms.

39. Claimant had stomach problems prior to 2003, but he is not currently taking medication. Stomach problems did not prevent him from performing his work nor did he miss time from work because of it.

40. Claimant denied shortness of breath and has not missed work due to breathing problems.

Subsequent low back injury 2005

41. Claimant sustained injury to his back and groin in a motor vehicle accident in 2005. Following the accident, Claimant treated with Missouri Baptist Hospital, Dr. Vibulakaopun, and the VA. He also received a settlement. Claimant testified

the pain increased for two months, then decreased to the pre-car accident level.

RULINGS OF LAW

After careful consideration of the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

1. The lumbar disc herniation and aggravation of the pre-existing degenerative disc disease are medically causally related to the February 2003 work injury.

Two major issues in this case involve whether Claimant's work injury was a substantial factor in aggravating lumbar stenosis at L4-6 and disc herniation at L5-6. "The Claimant bears the burden of proving an accident occurred and it resulted in injury. In addition, a claimant must show a disability resulted from the injury and the extent of such disability." *Hunsperger v. Poole Truck Lines*, 886 S.W.2d 656, 658 (Mo. App. E.D. 1994) (overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo.)). The aggravation of a pre-existing condition is a compensable injury if the claimant establishes a direct casual link between job duties and the aggravated condition. *Smith v. Climate Engineering*, 939 S.W.2d 429, 433-34 (Mo. App. E.D. 1996) (overruled on other grounds by *Hampton,* 121 S.W.3d 220. If a claimant can show that the performance of the usual and customary duties led to a breakdown or change in pathology, the injury is compensable. *Bennett v. Columbia Health Care*, 80 S.W.3d 524 (Mo.App.W.D. 2002) (overruled on other grounds by *Hampton,* 121 S.W.3d at 220.). The worsening of a pre-existing condition is a change in pathology. *Id*. at 529. Determinations of this kind require the assistance of expert medical testimony. Medical causation not within lay understanding or experience requires expert medical evidence. *Wright v. Sports Associated, Inc*., 887 S.W.2d 596 (Mo.banc 1994) (overruled on other grounds by *Hampton,* 121 S.W.3d at 220.). The weight to be accorded an expert's testimony should be determined by the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. *Choate v. Lily Tulip, Inc*., 809 S.W.2d 102 (Mo.App. 1991) (overruled on other grounds by *Hampton,* 121 S.W.3d at 220.).

I find Claimant has met his burden of proof in establishing that the work injury caused the need for disc surgery. I find the opinions of UHC, Drs. Shitut, Hertel, Bernardi, and Lichtenfeld more credible in establishing causation than the opinions of Drs. Mirkin or Cantrell. UHC, Dr. Hertel, Dr. Bernardi and Dr. Lichtenfeld all related the disc herniation to the fall. Drs. Shitut and Lichtenfeld diagnosed lumbar strains due to the fall. Claimant testified that he previously injured his back in 1975, and recovered after a brief course of treatment. He denied major back problems prior between 1975 and 2003 and no contradictory medical records were in evidence.

There was confusion whether a herniated disc was present and at what level. Dr. Cantrell did not find a herniated disc. Both Drs. Cantrell and Mirkin questioned Claimant's ability to perform heavy lifting for five months without treatment. But Dr. Hertel's explanation was credible that the gradual increase in pain could be caused by an annular tear which extruded disc material over time. Dr. Hertel was the first physician to identify the congenital sixth vertebrae which he opined increased the likelihood of pain. Dr. Hertel's opinion was credible that the stenosis became symptomatic due to the disc herniation. Dr. Bernardi opined Claimant's account of how the injury occurred could result in lumbar disc injury. Therefore, I find Claimant met his burden of proof regarding the need for disc surgery at L4-5 (L5-6). I find the disc herniation and aggravation of the pre-existing stenosis are medically causally related to the February 2003 work injury.

2. Employer is liable for $532.00 in past medical expenses.

Claimant seeks an award for payment of bills for treatment Employer did not provide totaling $7,104.75. §287.140.1 provides in part:

> In addition to all other compensation, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects

of the injury. If the employee desires, he shall have the right to select his own physician, surgeon, or other such requirement at his own expense.

The duty of the employer to provide treatment …by statute is unqualified and absolute. *Wilson v. Emery Bird Thayer Co*. 403 S.W.2d 953, 957 (Mo.App. 1966). In *Slider v. Brown Shoe Co.* 308 S.W.2d 306 (Mo.App. 1957) (overruled by on other grounds by *Hampton,* 121 S.W.3d at 220.). The court interpreted §287.140 as follows:

> 'Under Section 287.140 RSMo 1949, an employer has the privilege…of designating and selecting the physician and hospital to render the care required by the statute. However, if an employer, with notice that an employee has sustained a compensable accident (citation omitted), refuses or neglects to provide or tender necessary medical or hospital treatment, the injured employee need not lie helpless or in pain; but, in such circumstances, the employee may procure necessary treatment (within the statutory limitations) and have an award against the employer for the reasonable cost thereof'. (Emphasis supplied.)

At hearing, Claimant testified to receiving the following bills related to treatment for the February 2003 work injury:

- June 2003: 1) office visit - 6-19-03, 6/27/03 –Dr. Vibulakaopun - $105.00, 2) 6-25-03 - MRI - Parkland Health - $1,323.00, 3) 6-25-03 – Smith Imaging - $258.00, total: $1,686.00.

- July 2003: 1) 7-10-03 – office visit - Dr. Vibulakaopun –$130.00, 2)7-22 to 7-24-03- hospital visit – Dr. Vibulakaopun - $320.00, 3) 7-24-03-radiology – $335.00, 4) 7-25-03 – ER visit –Parkland - $271.00, 5) 7-25-03 – medication – Parkland - , 6) ER Farmington -7-22 to 7-24-03 - $229.30,– in patient care Parkland - $2,722.45, total: $4,007.75.

- August 2004: 1) 8-7-04 - $141.00, 2) 10-18-04 & 12-14-04 – radiology - $382.00 total : $523.00

Claimant also testified he did not seek treatment until four months after the injury when he saw his personal physician. Claimant did not ask Employer for treatment before seeking treatment on his own. Once notified, Employer sent Claimant to UHC within a reasonable period of time. UHC referred Claimant to Dr. Mirkin a short time later. While treating with Dr. Mirkin, Claimant continued to receive treatment from his personal physician, who referred him to Parkland Health Center for an emergency two day stay. Claimant testified that the Employer did not authorize the treatment or referral to Dr. Vibulakaopun. Claimant saw Dr. Mirkin the day before being admitted to Parkland Health Center. There is no evidence Claimant followed up with Dr. Mirkin when his symptoms increased the next day.

I find Employer did not refuse or neglect to provide Claimant with treatment once notified. Employer did not refuse Claimant treatment when his symptoms increased in July. Claimant initially selected his own medical care which he had the right to do at his own expense. Therefore, I do not find Employer liable for medical expenses incurred in June and July 2003 for these reasons.

With regard to the August 2004 bills:

…When …testimony accompanies the bills, which the employee identifies as being related to and the product of [his] injury, and when the bills relate to the professional services rendered as shown by the medical records in evidence, a sufficient factual basis exists for the [fact finder] to award compensation. *Martin v. Mid-America Farm Lines, Inc*. 769 S.W.2d 105, 111- 112 (Mo.1989). Claimant testified the August 7, 2004 charge resulted from a complication from the August 4th surgery and the 10/04 and 12/04 charges were for radiology follow up after surgery and were not authorized by the Insurer. At that point, I find Employer neglected to provide medical

treatment. There was no direct testimony regarding the reasonableness of the charges nor did Employer challenge the bills. I find the Employer liable for the 2004 medical charges totaling $532.00.

3. Claimant has not proven entitlement to future medical treatment from the work injury.

Claimant alleges he is entitled to an award for future medical benefits. §287.140.1 provides that the Claimant establish future medical care is reasonably required to 'cure and relieve' from the effects of the injury. Future medical care must flow from the accident before the employer is held responsible. *Modlin v. Sun Mark, Inc*. 699 S.W. 2d 5, 7 (Mo.App. E.D. 1985).

I do not find the record as a whole supports an award for future medical benefits. Dr. Lichtenfeld examined Claimant once and recommended on-going muscle relaxers, oral steroids, anti inflammatory and narcotic medication, MRI, possible fusion surgery, and pain management. Dr. Youkilis, the treating physician, and Dr. Bernardi released Claimant to return to work without additional treatment.

Although Claimant continued to receive treatment through the VA in the form of pain management, physical therapy, a back brace, and a TENS unit; no medical records show the treatment flows from the February 2003 work injury. A note dictated by Kenneth Smith Jr., M.D. at the VA, dated 9-19-05 stated surgery would 'make Claimant worse.' This opinion is consistent with most of the treating and evaluating doctors in this case.

Dr. Lichtenfeld is the only doctor recommending a fusion to prevent the progression of spondylolisthesis at L4-5. I find Dr. Bernardi's opinion more credible than Dr. Lichtenfeld's. Dr. Bernardi opined that Claimant's sixth vertebra put pressure on the level above resulting in degenerative facet joints, which produced mild spondylolisthesis but is not related to a work injury. Also, the 7-30-05 MRI revealed DDD at multiple levels, without herniation or canal stenosis, moderate bulging L4-L5, and moderate facet osteoarthritis with spurs but no recurrent herniation, and no disc herniation L5-S1. I find Claimant has not met his burden to show that future medical treatment would flow from the February 2003 work injury.

4. Claimant is entitled to $12,337.08 in Temporary Total Disability.

Claimant seeks TTD benefits from September 10, 2003 to January 21, 2004, totaling $12,337.08. [Claimant] bore the burden of proving his entitlement to TTD benefits by a reasonable probability. *Cooper v. Med. Ctr. of Independence,* 955 S.W.2d 570, 574-75 (Mo.App. W.D.1997) (overruled on other grounds by *Hampton*, 121 S.W.3d at 220). The test for entitlement to TTD "is not whether an employee is able to do some work, but whether the employee is able to compete in the open labor market under his physical condition." *Boyles v. USA Rebar Placement, Inc.,* 26 S.W.3d 418, 424 (Mo.App. W.D.2000) (overruled on other grounds by *Hampton, 121* S.W.3d at 220.). Thus, TTD benefits are intended to cover the employee's healing period from a work-related accident until he can find employment or his condition has reached a level of maximum medical improvement. *Id.* Once further medical progress is no longer expected, a temporary award is no longer warranted. *Id. Thorsen v. Sachs Elec.* Co. 52 S.W.3d 611, 621 (Mo.App. W.D. 2001) (overruled on other grounds by *Hampton,* 121 S.W.3d at 220.).

Although Claimant's condition worsened by September 10th, Dr. Shitut released him to work because his symptoms were caused by the pre-existing condition, not the work injury. However, Dr. Shitut admitted the work injury aggravated the degenerative condition which may not have become symptomatic but for the work injury. Dr. Hertel recommended surgery on October 29, 2003 therefore, Claimant had not reached MMI. Based on competent and substantial evidence, I find Claimant was unable to work because the pre-existing condition became symptomatic as a result of the work injury. Therefore, I find Claimant was unable to compete in the open labor from September 10, 2003 to January 21, 2004. I find Employer liable for 19 weeks of TTD benefits totaling $12,337.08.

5. Claimant is permanently and partially disabled from the February 2003 work injury.

Claimant is seeking permanent total disability compensation from either the Employer or the SIF. Under §287.020.7 the term "total disability"…means the inability to return to any employment and not merely [the] inability to return to the employment in which the employee was engaged at the time of the accident. The test for permanent total disability in Missouri is a claimant's ability to compete in the open labor market. The central question is whether any employer in the usual course of business could reasonably be expected to employ the claimant in his present physical condition. *Searcy v. McDonnell Douglas Aircraft Co*. 894 S.W.2d 173, 178 (Mo.App. E.D. 1995) (overruled on other grounds by *Hampton,* 121 S.W.3d at 220.).
If a claimant's last injury in and of itself rendered the claimant permanently and totally disabled, then the Second Injury Fund has no liability and employer is responsible for the entire amount. *Hughey v. Chrysler Corp*. 34 S.W.3d 845, 847 (Mo.App. E.D. 2000). Therefore, the inquiry begins with the Employer's liability.

I do not find Claimant has met his burden to show he is permanently and totally disabled from the February 2003 work injury. I do find Claimant's testimony to be credible that he had no problems with his back prior to the February 2003 work injury. Claimant injured his back in 1975 and received a brief course of conservative care before being released. He may have received a workers' compensation settlement for this injury; however, the details are not in evidence. No medical records are in evidence for any back treatment prior to February 2003. Claimant testified that before February 2003 he could lift 50 pounds with one hand and 100 pounds with both hands. Claimant's work activities also included bending, stooping and kneeling.

I do not find Claimant's testimony credible regarding his level of complaints and inability to work after the February 2003 work injury. Three weeks following surgery Claimant reported 90% improvement. He could sit and walk for longer periods and was pleased with the results. During an office visit with Dr. Youkilis on September 27th, Claimant reported increased pain while lifting weights on his right foot in therapy, however, X-rays revealed no instability. Claimant called Dr. Youkilis' office and stated that while in physical therapy on October 14th, he picked up a 10 pound box and was in too much pain to continue therapy due to sharp left sided pains and difficulty walking. However, Ms. Martin, the therapist, denied this occurred because Claimant asked to defer lifting on that day due to pain. Nevertheless, in response to Claimant's complaints, Dr. Youkilis ordered work hardening and a functional capacity evaluation to attempt to isolate the problem. He also noted that Claimant's symptoms seemed to correlate with his son's serious health problems.

Work Hardening

Claimant refused to complete the test due to complaints of increased low back pain. Ms. Martin found Claimant's subjective complaints were 'out of proportion to his displayed function.' Possible symptom magnification and Waddell signs observed during testing made it difficult to identify Claimant's abilities and limitations. Ms. Martin concluded the likelihood of Claimant returning to work full duty was poor due to his severely limiting subjective complaints, sub-maximal effort, and insistence on frequent breaks to lie down for five to ten minutes.

Functional Capacity Evaluation

Therapist Chuck Stapinski concluded Claimant is employable full time at the light work demand level. He also noted Claimant failed 7 of 12 validity criteria indicating sub-maximal effort, which was Claimant's primary limiting factor, resulting in inability to identify Claimant's abilities and limitations. Claimant displayed symptom magnification in the following areas during evaluation: 1) Lack of significant change in quality of movement despite increased subjective complaints, 2) Nonanatomic tenderness, and 3) Inappropriate symptoms and overreaction. Results indicate Claimant's symptoms are not consistent with functional ability and behavior and/or performance is sub-maximal or inconsistent.

Claimant continued to complain that his pre-surgery symptoms had returned, however an MRI showed no evidence of recurrent disc herniation or stenosis. A myelogram and post myelogram CT showed mild instability at L4-5 with poor filling at the L4-5 nerve root sheath bilaterally, which caused Dr. Youkilis to consider fusion surgery. But given Claimant's 'constellation of symptoms' it was difficult to determine if the mild instability was a

factor, so he recommended a second opinion.

Dr. Bernardi provided the second opinion and reviewed the October 2004 MRI, which revealed good right sided decompression at L5-6. Dr. Bernardi only found subjective pain complaints. He opined the myelogram and post myelogram CT revealed mild residual stenosis which was "not capable of resulting in the type of incapacitating symptoms Claimant described." He opined that: "the distribution of leg pain described by Claimant is not terribly consistent with a dermatomal pattern." Giving Claimant the benefit of the doubt for language problems, Claimant also lacked any signs of nerve root tension or objective deficits that would suggest nerve root compression." Claimant also exhibited multiple Waddell signs during examination. Therefore, Dr. Bernardi opined that Claimant needed no additional surgery and released him to return to work with a 50 to 75 pound permanent lifting restriction.

Claimant's symptoms increased again to include: 1) Pain with "lying, sitting, walking, and almost anything physical," 2) Two episodes of total sensory body loss, 3) Burning in his legs, 4) Groin numbness, and 4) Back symptoms more intense than the other body parts. Claimant took Tylenol to relieve pain.

Restrictions

Based upon work hardening and FCE results, Dr Bernardi's opinion, MRI, myelogram and post myelogram CT results, and physical examination, Dr. Youkilis concluded that the small amount of compression at L5-6 did not explain Claimant's 'constellation of back and lower extremity symptoms,' and released Claimant to return to work with a 50 pound lifting restriction.

Permanent lifting restrictions were imposed by Drs. Lichtenfeld, Youkilis, and Bernardi, but no doctor has opined that Claimant was unable to return to work. Despite disagreeing with the FCE method of evaluation, Dr. Lichtenfeld did not disagree with the outcome. Like the FCE, he set restrictions but did not say Claimant was unable to compete in the open labor market. Dr. Lichtenfeld set the following restrictions: 1) Lifting to 25 pounds once and 10 to 15 pounds repetitively waist to shoulder only, 2) Avoid prolonged sitting, standing, 3) Alternate between two positions once per hour as needed, 4) Avoid squatting, bending, twisting and stooping, and 5) Avoid operating powered tools.

Vocational Training and Job Placement Opportunities

Mr. Lalk found Claimant had no transferable skills for sedentary work but based on medical restrictions, he could work in a light welding position on an assembly line or in a factory, working at chest level, or in an unskilled entry level position, i.e. cashier at a convenience store, unarmed security guard, information clerk, customer service representative, or desk clerk for a motel or rental store.

However, Mr. Lalk concluded Claimant could not perform within the restrictions set by any doctor based on Claimant's statement that he cannot stand, walk or sit through a full workday without lying down repeatedly. Claimant's own vocational expert found Claimant 'obsessed' about his symptoms, by 'holding his back when walking, moaning and sighing constantly.' Mr. Lalk concluded:

> "I cannot recommend any vocational rehabilitation services for Mr. Antunez unless he is better able to control his symptoms and he expresses an ability to work at the sedentary level or better through a full workday on a regular basis. Although he might be able to run his own business on a part-time basis, he has not described capabilities or freedom from symptoms which would allow him to work at a level of activity commensurate with a competitive job." Consequently, Mr. Lalk did not believe "any employer would consider hiring someone who presents himself with such pain complaints. He currently averages lying down 6 to 8 hours each day outside of attempts to sleep at night."

Claimant scored at the fourth-grade level in reading and sixth-grade in math, but refused to take the reading comprehension test stating he was in too much pain. As a result, Mr. Lalk was unable to determine if Claimant could pursue post secondary training. However, based on two test results and Claimant's history, Mr. Lalk concluded Claimant would not likely pursue post secondary training until he received remedial training. Based on Mr. Lalk's experience, he did not know of any employer that would be willing to hire Claimant given his skill

level, experience, restrictions and need for extended breaks, including lying down multiple times during the day. Mr. Lalk could not recommend vocational rehabilitation services or employers until Claimant had more control over his symptoms and the ability to work a full day in a sedentary position. He had a similar opinion about Claimant's ability to operate a business.

Claimant's testimony regarding his subjective complaints is not credible. Claimant's increased symptoms followed a questionable lifting incident during physical therapy. It is not unusual for some on-going symptoms to remain following an injury. However, work hardening and FCE staff found Claimant's sub-maximal effort to be his primary limiting factor. Mr. Lalk said Claimant obsesses about his injury. This behavior diminished the ability to accurately evaluate Claimant's ability to work. Additionally, no objective findings correlate to his level of complaints. Treating and evaluating physicians repeatedly observed Claimant to have symptoms out of proportion to objective findings. Medical staff reported untruthfulness about the lifting incident, self-limiting effort, Waddell signs, disproportionate symptoms to verbalization, facial expressions and muscle tension during tests, and a dramatic response to light touch, which demonstrate Claimant's lack of credibility. Claimant denied telling Mr. Lalk he could not lift a cup of coffee. Even Dr. Youkilis suggested Claimant may have secondary gain issues.

Claimant reported inconsistent symptoms. After saying he could not perform work hardening due to a lifting injury, the next day he lifted 25 pounds from floor to waist and 15 pounds from waist to shoulder with good body mechanics and no decline in quality of movement. Later, he stopped work hardening due to pain.

Additionally, at hearing, Claimant testified that he could not sit longer than 30 minutes without pain. But he admitted on cross examination that he has ridden 90 minutes to the casino. I do not find it persuasive that Claimant had to leave after two hours because of pain.

Only Dr. Lichtenfeld recommended breaks to eat snacks for alleged pre-existing reflux disease, not for the February 2003 work injury. Dr. Lichtenfeld did not recommend Claimant lie down up to eight hours during the day. After returning from a short recess during the hearing, Claimant informed the Court that he had to lie down during the break. I find no doctors have imposed breaks for Claimant to lie down. I find Claimant imposed this restriction on himself.

Claimant's testimony about his inability to work is also not credible. There are jobs identified within the restrictions which Claimant could perform, provided he was willing to do so. But Claimant has not sought any employment within the restrictions, despite being released by Dr. Youkilis to return to work nearly two years ago. Based on competent and substantial evidence, I find Claimant's self-limiting behavior and obsession with pain are major reasons an employer would not hire him. The law provides permanent total disability when an employee is unable to compete in the open labor market, not when an employee is unwilling to do so. (emphasis added). The restrictions placed by all doctors suggest an employer may reasonably be expected to employ Claimant in his present physical condition. Mr. Lalk's inability to recommend vocational training or employment is based in large part on Claimant's obsessive symptoms, frequent requests to lie down, and the inability to determine Claimant's limitations due to his lack of cooperation. I find that jobs have been identified within the stated restrictions which Claimant has not attempted to seek. I find no medical basis for Claimant's obsessive symptom behaviors and self-imposed frequent rest breaks. For these reasons, I find Claimant has not met his burden of proof to show that he is unable to compete in the open labor market is not permanently and totally disabled as a result of the February 2003 work injury.

I find that although Claimant is not permanently and totally disabled, he did sustain permanent partial disability from the February 2003 work injury. A permanent partial award is intended to cover claimant's permanent limitations due to a work related injury and any restrictions his limitations may impose on employment opportunities. *Phelps v. Jeff Wolk Construction Co.,* 803 S.W.2d 641,646 (Mo.App. 1991) (overruled on other grounds by *Hampton,* 121 S.W.3d at 220). With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the special province of the finder of fact. *Banner Iron Works v. Mordis,* 663 S.W.2d 770, 773 (Mo.App. 1983) (overruled on other grounds by *Hampton,* 121 S.W.3d at 220).

Claimant was unable to return to regular pipe fitting duties according to all the credible evidence. As stated

above, three doctors restricted the lifting activities Claimant has performed for thirty years. Dr. Lichtenfeld rated 35% of the body as a whole for Claimant's low back injury related to the February 2003 work injury. No other ratings are in evidence. Based on the entire record, including Claimant's testimony and the expert opinion, I find Claimant sustained 35% permanent partial disability of the body as a whole as a direct result of the February 8, 2003 work injury.

6. No pre-existing conditions trigger SIF liability.

The next question is whether the SIF is liable based on a combination of Claimant's primary and pre-existing disabilities. SIF liability may be triggered if the employer is not responsible for total disability. To recover from the SIF, a claimant must first prove a pre-existing permanent partial disability whether from a compensable injury or otherwise, pursuant to §287.220. Section 287.220 which requires Claimant's prior and primary injuries meet certain "thresholds" in order to trigger SIF liability, provides in part:

> If ay employee who has a qualifying pre-existing disability receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities [the Second Injury Fund will have liability][1]

Dr. Lichtenfeld rated the following pre-existing conditions:

15% permanent disability of the body as a whole for gastroesphageal reflux disease and gastritis. Although Claimant takes over the counter medication as needed, no medical records are in evidence after the diagnosis in 2001. 15% permanent disability of the body as a whole for symptoms of emphysema. Dr. Lichtenfeld diagnosed emphysema based on Claimant's 40 year history of tobacco use, but there are no treatment records in evidence. Dr. Lichtenfeld disagreed with computer generated COPD results he ordered which show claimant's lung age to be equivalent to his actual age. 40% permanent disability of the left elbow for a fracture when he was five years old but there are no medical records in evidence. Claimant testified he has arthritis which hurts occasionally.

I find that SIF liability is not triggered. No medical records are in evidence for any alleged pre-existing injury. Dr. Lichtenfeld's 'presumed emphysema diagnosis' is based solely on the fact that Claimant has a forty year history of heavy smoking. Claimant testified that his left elbow occasionally hurts but he had no problems performing heavy demand level work due to either his elbow or stomach. Claimant further testified that he has no shortness of breath and only wheezes once a year when he contracts the flu. Taking occasional over the counter medications for stomach problems does not trigger SIF liability. Based upon competent and substantial evidence contained in the record as a whole, I do not find Claimant has met his burden of proof to show the pre-existing conditions meet the threshold needed to trigger SIF liability for permanent partial disability, therefore, the SIF claim is denied.

CONCLUSION

Claimant sustained a work injury to his low back and Employer shall compensate Claimant 140 weeks of permanent partial disability compensation, TTD benefits, and past medical expenses pursuant to this award. The Second Injury Fund claim is denied. Claimant's attorney is entitled to a 25% lien on benefits awarded for services rendered.

Date: _____ Made by: _____

Suzette Carlisle

Administrative Law Judge

Division of Workers' Compensation

A true copy: Attest:

_____

Patricia “Pat” Secrest

Director

Division of Workers' Compensation

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[1] The language in brackets replaces and summarizes the much longer statutory language.